

## Campbell, Rich

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**From:** Valiela, Luisa  
**Sent:** Monday, December 28, 2015 11:25 AM  
**To:** Kao, Jessica  
**Cc:** Smith, DavidW  
**Subject:** FW: Waterkeeper's Stormwater Petitions to the State Water Board  
**Attachments:** SF Baykeeper\_MRP Petition\_12.18.15\_FINAL.pdf; SDCK CERF\_Petition to State Bd SD.pdf

Jessica, as per Bill's request that you get this to review..

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**From:** Sean Bothwell [<mailto:sbothwell@cacoastkeeper.org>]  
**Sent:** Tuesday, December 22, 2015 8:14 AM  
**To:** Smith, DavidW <[Smith.DavidW@epa.gov](mailto:Smith.DavidW@epa.gov)>  
**Cc:** 'Matt O'Malley' <[matt@sdcoastkeeper.org](mailto:matt@sdcoastkeeper.org)>; George Torgun ([george@baykeeper.org](mailto:george@baykeeper.org)) <[george@baykeeper.org](mailto:george@baykeeper.org)>; Sejal Choksi ([sejal@baykeeper.org](mailto:sejal@baykeeper.org)) <[sejal@baykeeper.org](mailto:sejal@baykeeper.org)>; Ian Wren ([ian@baykeeper.org](mailto:ian@baykeeper.org)) <[ian@baykeeper.org](mailto:ian@baykeeper.org)>; Sara Aminzadeh <[Sara@cacoastkeeper.org](mailto:Sara@cacoastkeeper.org)>; Kozelka, Peter <[Kozelka.Peter@epa.gov](mailto:Kozelka.Peter@epa.gov)>  
**Subject:** Waterkeeper's Stormwater Petitions to the State Water Board

Hey Dave,

I thought you would be interested in our recent petitions to the State Water Board regarding the Bay Area's Stormwater MRP and San Diego's Phase I Permit.

If you have any questions or would like to discuss, I am cc'ing Matt O'Malley (San Diego Coastkeeper) and George Torgun (San Francisco Baykeeper).

Have a happy holidays!

Best,  
Sean

\*\*\*\*\*

Sean Bothwell, Policy Director  
California Coastkeeper Alliance  
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14 Attorneys for COASTAL ENVIRONMENTAL RIGHTS FOUNDATION

11 STATE OF CALIFORNIA  
12 STATE WATER RESOURCES CONTROL BOARD

14 In the Matter of the Petition of San Diego	)	PETITION FOR REVIEW OF SAN
15 Coastkeeper and Coastal Environmental Rights	)	DIEGO REGIONAL WATER
16 Foundation, for Review of Action by the	)	QUALITY CONTROL BOARD
17 California Regional Water Quality Control	)	ACTION OF ADOPTING ORDER
18 Board, San Diego Region, in Adopting the	)	NO. R9-2015-0100
19 National Pollutant Discharge Elimination System	)	
20 (NPDES) Permit and Waste Discharge	)	
21 Requirements for Discharges from the Municipal	)	
22 Separate Storm Sewer Systems (MS4s) Draining	)	
23 the Watersheds Within the San Diego Region;	)	
24 Order No. R9-2013-001, as Amended by Order	)	
25 Nos. R9-2015-0001 and R9-2015-0100; NPDES	)	
26 No. CAS0109266	)	

1 In accordance with Section 13320 of the California Water Code and Section 2050 of Title  
2 23 of the California Code of Regulations, San Diego Coastkeeper and Coastal Environmental  
3 Rights Foundation (“Petitioners”) hereby petitions the State Water Resources Control Board  
4 (“State Board”) to review the final decision of the California Regional Water Quality Control  
5 Board for the San Diego Region (“Regional Board”) in adopting the National Pollutant Discharge  
6 Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the  
7 Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego  
8 Region; Order No. R9-2013-001, as Amended by Order Nos. R9-2015-0001 and R9-2015-0100;  
9 NPDES No. CAS0109266 (“2013 Permit”). The Regional Board adopted the final order in this  
10 matter on November 18, 2015.

11 The 2013 Permit regulates stormwater discharges from municipal separate storm sewer  
12 systems (“MS4s”) and other designated stormwater discharges within defined portions of San  
13 Diego County, Orange County, and Riverside County. The City of San Diego, the County of San  
14 Diego, and 37 other entities, including incorporated cities, unincorporated counties, the San Diego  
15 Unified Port District, and the San Diego County Regional Airport Authority, are Permittees.

16 The Permittees occupy an area encompassing Laguna Beach and Mission Viejo to the west,  
17 Murietta to the east, and southward through San Diego County to the Mexico border. The areas  
18 covered by the 2013 Permit include the vast majority of drainage infrastructure within  
19 incorporated and unincorporated areas in every watershed within the San Diego Region.

20 In May 2013, the Regional Board adopted Order No. R9-2013-0001, which granted a  
21 National Pollutant Discharge Elimination System (“NPDES”) municipal stormwater permit for  
22 urban runoff discharges within the portions of the County of San Diego and 37 cities, districts, or  
23 authorities within the San Diego region. The Regional Board amended Order R9-2013-001 in  
24 February 2015, and then again in November 2015 by adopting Orders No. R9-2015-0001 and R9-  
25 2015-0100 respectively.

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27 ///

28 ///

1. NAME, ADDRESS, TELEPHONE NUMBER, AND E-MAIL ADDRESS OF THE PETITIONERS:

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(619) 758-7743

Coastal Environmental Rights Foundation  
1140 South Coast Highway 101  
Encinitas, CA, 92024  
Telephone: 760-942-8505  
E-mail: marco@cerf.org  
Attention: Marco A. Gonzalez

2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW AND A COPY OF ANY ORDER OR RESOLUTION OF THE REGIONAL BOARD WHICH IS REFERRED TO IN THE PETITION:

Petitioners seek review of the Regional Board's November 18, 2015 adoption of the National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego Region; Order No. R9-2013-001, as Amended by Order Nos. R9-2015-0001 and R9-2015-0100; NPDES No. CAS0109266. A copy of the Order is available from the San Diego Water Board website at:

[http://www.waterboards.ca.gov/sandiego/water\\_issues/programs/stormwater/rsd\\_stormwater.shtml](http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/rsd_stormwater.shtml)

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT OR ON WHICH THE REGIONAL BOARD WAS REQUESTED TO ACT:

November 18, 2015.

4. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:

In approving the Permit, the Regional Board failed to act in accordance with relevant governing law, acted arbitrarily and capriciously, without substantial evidence, and without adequate findings. Specifically, but without limitation, the Regional Board:

- 1           A.           Failed to make sufficient findings “to bridge the analytical gap between the  
2                       raw evidence and ultimate decision”—approval of the Permit. (*Topanga*  
3                       *Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d  
4                       506, 515.) The Board acted arbitrarily and capriciously because the ultimate  
5                       decision of adopting the Permit is not supported by the findings and the  
6                       findings are not supported by the weight of the evidence in the  
7                       administrative record, thus resulting in an abuse of discretion. (Cal. Code  
8                       Civ. Proc. § 1094.5.)
- 9           B.           Failed to adequately respond to factually and legally specific comments  
10                      from public interest organizations concerning significant matters at issue,  
11                      such as the Permit’s incorporation of safe harbor provisions and its  
12                      noncompliance with state and federal anti-backsliding regulations, and the  
13                      Permit’s failure to comply with State Board Order WQO 2015-0075  
14                      requirements for safe harbors.
- 15          C.           Improperly adopted safe harbor provisions that excuse compliance with the  
16                      2007 and Original 2013 Permit’s Receiving Water Limitations provisions in  
17                      some circumstances, in violation of federal anti-backsliding regulations  
18                      under 33 U.S.C. § 402(o) and 40 C.F.R. § 122.44(l).
- 19          D.           Improperly adopted safe harbor provisions that violate requirements for  
20                      incorporation of total maximum daily loads (“TMDLs”) in to National  
21                      Pollution Discharge Elimination System permits.
- 22          E.           Failed to adequately require in the Permit that certain interim and final  
23                      Waste Load Allocations (“WLAs”) established by applicable Total  
24                      Maximum Daily Loads (“TMDLs”) are enforceable permit effluent  
25                      limitations. (40 C.F.R. § 122.44(d)(1)(vii)(B).)
- 26          F.           Improperly adopted safe harbor provisions that violate State Board Order  
27                      WQ 2015-0075 requirements for inclusion of safe harbor provisions in  
28                      regions outside Los Angeles County.

1 G. Improperly adopted safe harbor provisions that violate State Board Order  
2 WQO 2015-0075 requirements for making a specific showing that  
3 application of given principles is not appropriate for region-specific or  
4 permit-specific reasons.  
5

6 5. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED:

7 Petitioners are non-profit, environmental organizations that have a direct interest in  
8 protecting the quality of San Diego County's aquatic health and resources, including San Diego  
9 Bay, the San Diego River, the Pacific Ocean, and other San Diego area waters, as well as the  
10 health of beachgoers and other users.

11 San Diego Coastkeeper ("Coastkeeper") is a non-profit organization dedicated to the  
12 preservation, protection, and defense of the rivers, creeks and coastal waters of San Diego County  
13 from all sources of pollution and degradation. Coastkeeper represents members who live and/or  
14 recreate in and around the San Diego area.

15 Coastal Environmental Rights Foundation ("CERF") is an environmental organization  
16 dedicated to the protection and enhancement of coastal natural resources and the quality of life for  
17 coastal residents, including the coastline and lagoons in and around San Diego County. CERF  
18 engages in community activism, and participates in governmental hearings for the past, present,  
19 and future environmental impacts on the oceans and beaches. Members of CERF live in areas of  
20 the Regional Board's jurisdiction that are impacted by the Amended 2013 Permit's environmental  
21 effects.

22 Petitioners' members recreate in and around the waters to which the Amended 2013 Permit  
23 regulates discharges of stormwater runoff and are impacted by pollution in stormwater runoff and  
24 its resulting health impacts, and by beach closures which restrict the ability of residents and  
25 visitors in San Diego County to use the beach and local waters for recreation and other purposes.  
26 In particular, Petitioners' members directly benefit from San Diego County waters in the form of  
27 recreational swimming, surfing, diving, photography, birdwatching, fishing, scientific study, and  
28 boating. Petitioners' members are aggrieved by the Amended 2013 Permit's inadequacy to control

1 polluted urban stormwater runoff or support the beneficial uses of the receiving waters in  
2 accordance with the Clean Water Act.

3         The Regional Board's failure to adequately control urban stormwater runoff through the  
4 Amended 2013 Permit, or to assure that the Amended 2013 Permit's provisions meet the  
5 requirements of the Clean Water Act and assure that pollution in stormwater discharges will not  
6 degrade the region's waters, has enormous consequences for San Diego County residents and  
7 Petitioners' members. Urban stormwater runoff is one of the largest sources of pollution to the  
8 coastal and other receiving waters of the nation, and is a particularly severe problem in the San  
9 Diego region. Waters discharged from municipal storm drains carry bacteria, metals, and other  
10 pollutants at unsafe levels to rivers, lakes, and beaches in San Diego County. This pollution has  
11 damaging effects on both human health and aquatic ecosystems, causing increased rates of human  
12 illness and resulting in an economic loss of tens to hundreds of millions of dollars every year from  
13 public health impacts alone. The pollutants also adversely impact aquatic animals and plant life in  
14 receiving waters.

15         Receiving waters in the Permittees' jurisdiction continue to be impaired for a variety of  
16 pollutants, and monitoring data show that stormwater discharges continue to contain pollutants at  
17 levels that can cause or contribute to these impairments.

18         Urban development increases impervious land cover and exacerbates problems of  
19 stormwater volume, rate, and pollutant loading. Consequently, San Diego County's high rate of  
20 urbanization and persistent water quality problems demand that the most effective stormwater  
21 management tools be required. The Amended 2013 Permit, however, often lacks clear,  
22 enforceable standards, and weakens provisions that were required by the previous 2007 San Diego  
23 County MS4 permit, as well as the Original 2013 permit, which prohibit discharges of stormwater  
24 from causing or contributing to violations of water quality standards.

25         All of these documented facts demonstrate the considerable negative impact on Petitioners'  
26 members and the environment that continues today as a result of the Regional Board's inadequate  
27 efforts to control stormwater pollution through the Amended 2013 Permit.

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1 6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH  
2 PETITIONERS REQUEST:

3 Petitioners seek an Order by the State Board that:

4 Overturns the illegal provisions of the National Pollutant Discharge Elimination  
5 System (NPDES) Permit and Waste Discharge Requirements for Discharges from  
6 the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds  
Within the San Diego Region; Order No. R9-2013-001, as Amended by Order Nos.  
R9-2015-0001 and R9-2015-0100; NPDES No. CAS0109266.

7 Or, alternatively, remands the matter to the Regional Board with specific direction  
8 to the Board to remedy each of its violations of law as further described herein.

9 7. A STATEMENT IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION:

10 See, Section 4, above. Petitioners have enclosed a separate Memorandum of Points and  
11 Authorities in support of this Petition.

12 8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE  
13 REGIONAL BOARD AND TO THE DISCHARGERS, IF NOT THE PETITIONERS:

14 A true and correct copy of this petition was delivered by electronic mail to the Regional  
15 Board Executive Officer David Gibson on December 17, 2015. A true and correct copy of this  
16 petition was also mailed via First Class mail on December 17, 2015 to the Regional Board and the  
17 Permittees.

18  
19 9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN  
20 THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD OR AN  
21 EXPLANATION OF WHY THE PETITIONERS WERE NOT REQUIRED OR WERE  
22 UNABLE TO RAISE THESE SUBSTANTIVE ISSUES OR OBJECTIONS BEFORE  
THE REGIONAL BOARD.

23 All of the substantive issues and objections raised herein were presented to the Regional  
24 Board during the period for public comment on the draft Permit, including during public comment  
25 periods during the original 2013 adoption, the February 2015 amendments, and the November  
26 2015 amendments. Petitioners submitted written comments on January 11, 2013 and September  
27 10, 2015. Petitioners presented testimony before the Regional Board during public hearings on  
28



1 April 10 and 11, 2013, May 8, 2013, as well as subsequent amendment hearings on February 11,  
2 2015, and November 18, 2015.

3  
4 Respectfully submitted via electronic mail,

5  
6 Dated: December 17, 2015


7 SAN DIEGO COASTKEEPER

8 

9 Matt O'Malley

10 Attorney for SAN DIEGO COASTKEEPER

11 COAST LAW GROUP LLP

12  
13 

14 Marco Gonzalez

15 Attorneys for COASTAL ENVIRONMENTAL RIGHTS  
16 FOUNDATION  
17  
18  
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**PROOF OF SERVICE**

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is: 1140 S. Coast Highway 101, Encinitas CA 92024.

On December 17, 2015 I served the within document described as **PETITION FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD ACTION OF ADOPTING ORDER NO. R9-2015-0100** on the following interested parties in said action by placing a true copy thereof in the United States mail enclosed in a sealed envelope with postage prepaid, addressed as follows:

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Environmental Affairs Department  
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21	Moy Yahya	Humza Javed
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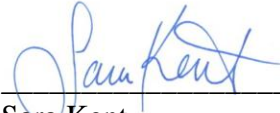
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Control Board  
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1 I am "readily familiar" with the firm's practice of collection and processing  
2 correspondence for mailing. It is deposited with U.S. postal service on that same day in the  
3 ordinary course of business. I am aware that on motion of party served, service is presumed  
4 invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for  
5 mailing in affidavit.

6 I declare under penalty of perjury under the laws of the State of California that the  
7 foregoing is true and correct.

8 Executed on December 17, 2015, at San Diego, California.

9   
Sara Kent

George Torgun (State Bar No. 222085)  
SAN FRANCISCO BAYKEEPER  
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Attorney for Petitioner  
SAN FRANCISCO BAYKEEPER

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of San Francisco  
Baykeeper for Review of Action by the California  
Regional Water Quality Control Board, San  
Francisco Bay Region, in Adopting Order No. R2-  
2015-0049, Municipal Regional Stormwater  
NPDES Permit - Municipalities and Flood  
Management Agencies in Alameda County, Contra  
Costa County, San Mateo County, Santa Clara  
County, and the Cities of Fairfield, Suisun City, and  
Vallejo and the Vallejo Sanitation and Flood  
Control District in Solano County, NPDES Permit  
No. CAS612008.

PETITION FOR REVIEW OF SAN  
FRANCISCO BAY REGIONAL WATER  
QUALITY CONTROL BOARD ACTION  
ADOPTING ORDER NO. R2-2015-0049

Pursuant to Section 13320 of the California Water Code and Section 2050 of Title 23 of the California Code of Regulations, San Francisco Baykeeper (“Baykeeper” or “Petitioner”) hereby petitions the State Water Resources Control Board (“State Board”) to review the final decision of the California Regional Water Quality Control Board, San Francisco Bay Region (“Regional Board”) approving the Municipal Regional Stormwater NPDES Permit, Order No. R2-2015-0049, NPDES Permit No. CAS612008 (the “2015 Permit” or “Permit”). The 2015 Permit regulates the discharge of stormwater runoff from the municipal separate storm sewer systems (“MS4s”) and other designated stormwater discharges from municipalities and flood management agencies in Alameda County, Contra Costa County, San Mateo County, Santa Clara County, and the Cities of Fairfield, Suisun City, and Vallejo and the Vallejo Sanitation and Flood Control District in Solano County (collectively, the “Permittees”).

**1. Name, address, telephone number and email address of the petitioner.**

San Francisco Baykeeper  
Attn: George Torgun, Managing Attorney  
1736 Franklin Street, Suite 800  
Oakland, CA 94612  
Phone: 510-735-9700  
Email: [george@baykeeper.org](mailto:george@baykeeper.org)

**2. The specific action of the regional board which the state board is requested to review, and a copy of any order or resolution of the regional board which is referred to in the petition.**

Baykeeper seeks review of the Regional Board’s November 19, 2015 approval of the Municipal Regional Stormwater NPDES Permit, Order No. R2-2015-0049, NPDES Permit No. CAS612008. A copy of the Order is attached as Exhibit A.

**3. The date on which the Regional Board acted.**

The Regional Board approved the Permit at issue on November 19, 2015.

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2 **4. A full and complete statement of the reasons the action was inappropriate or improper.**

3 In approving the 2015 Permit, the Regional Board failed to act in accordance with relevant  
4 governing law, including the Clean Water Act and State Board Order WQ 2015-0075, acted arbitrarily  
5 and capriciously, without substantial evidence, and without adequate findings. Specifically, but without  
6 limitation, the Regional Board:

- 7 A. Improperly adopted safe harbor provisions in Section C.1 of the Permit that excuse compliance  
8 with the Permit's Receiving Water Limitations and Discharge Prohibitions for specific pollutants  
9 and receiving waters, in violation of the anti-backsliding requirements of the Federal Water  
10 Pollution Control Act, 33 U.S.C. § 1251 *et seq.* ("Clean Water Act" or "Act") (*see* 33 U.S.C. §  
11 1342(o); 40 C.F.R. 122.44(l));
- 12 B. Improperly adopted safe harbor provisions in Section C.1 of the Permit that excuse compliance  
13 with the Permit's Receiving Water Limitations and Discharge Prohibitions for specific pollutants  
14 and receiving waters, in violation of the standards governing such provisions in State Board  
15 Order WQ 2015-0075;
- 16 C. Failed to include monitoring provisions in Sections C.8 and C.10 of the Permit that "assure  
17 compliance with permit limitations" or "yield data which are representative of the monitored  
18 activity," in violation of the Clean Water Act (*see* 40 C.F.R. §§ 122.44(i)(1), 122.48(b));
- 19 D. Acted arbitrarily and capriciously because the ultimate decision of adopting the Permit is not  
20 supported by the findings, and the findings are not supported by the weight of the evidence in the  
21 administrative record, resulting in an abuse of discretion. (Cal. Code Civ. Proc. § 1094.5.)  
22 Stated another way, the Regional Board failed to "set forth findings to bridge the analytic gap  
23 between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic*  
24 *Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.)

25 **5. The manner in which the petitioner is aggrieved.**

26 Petitioner San Francisco Baykeeper is a non-profit environmental organization dedicated to  
27 protecting San Francisco Bay and surrounding tributaries and resources, including the Pacific coast, for  
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1 the benefit of the Bay ecosystem and interdependent human communities. Baykeeper's members  
2 directly benefit from these resources in the form of recreational swimming, fishing, surfing,  
3 photography, bird watching, and boating, among other uses, each of which uses have been, are, and will  
4 continue to be adversely impacted by the addition of pollutants to San Francisco Bay and its tributaries  
5 from the subject Permittees. Petitioners' members are therefore aggrieved by the Regional Board's  
6 failure to adequately control the discharge of municipal stormwater pollution, to prevent such pollution  
7 from causing or contributing to violations of water quality standards, or to support the beneficial uses of  
8 the receiving waters.

9 In particular, the Regional Board's failure to adequately control municipal stormwater runoff  
10 through this Permit, or to ensure that the Permit's provisions meet the requirements of the Clean Water  
11 Act, California Water Code, and implementing regulations, has enormous consequences for the region  
12 and its residents. Receiving waters in the San Francisco Bay region continue to be impaired for a  
13 variety of pollutants, and monitoring data shows that stormwater discharges contribute to certain  
14 pollutants at levels that cause or contribute to such impairments. Urban stormwater runoff is one of the  
15 largest sources of pollution in San Francisco Bay and its tributaries. Pollutants in stormwater can  
16 adversely impact avian, aquatic, and plant life in receiving waters and can cause serious human health  
17 impacts. For example, high mercury levels in the Bay make regular consumption of fish unsafe. PCBs  
18 are toxic and persistent organic pollutants that cause adverse health effects to humans and wildlife,  
19 including cancer, liver damage, skin irregularities, and impact child development. Trash pollution poses  
20 a visual distraction and discourages recreation-based beneficial uses, and can cause serious problems for  
21 wildlife, wildlife habitat, and human health by leaching contaminants and smothering benthic  
22 communities. All of these documented facts demonstrate the continued negative impacts on  
23 Baykeeper's members and the environment that result from the Regional Board's failure to adequately  
24 control municipal stormwater pollution through the Permit.

25 **6. The specific action by the state or regional board which petitioner requests.**

26 Petitioner seeks an Order by the State Board that overturns the Regional Board's approval of the  
27 Municipal Regional Stormwater NPDES Permit, Order R2-2015-0049, NPDES Permit No. CAS612008,  
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1 and remands the matter to the Regional Board with specific direction to remedy each of its violations of  
2 law as further described herein.

3       **7. A statement of points and authorities in support of legal issues raised in the petition,**  
4               **including citations to documents or the transcript of the regional board hearing if it is**  
5               **available.**

6 **A. INTRODUCTION**

7       This petition seeks review of the Regional Board’s approval of the Municipal Regional  
8 Stormwater NPDES Permit, Order No. R2-2015-0049, NPDES Permit No. CAS612008, which regulates  
9 the discharge of stormwater runoff from MS4s and other designated stormwater discharges from  
10 municipalities and flood management agencies in Alameda County, Contra Costa County, San Mateo  
11 County, Santa Clara County, and the Cities of Fairfield, Suisun City, and Vallejo and the Vallejo  
12 Sanitation and Flood Control District in Solano County. Stormwater runoff is one of the most  
13 significant sources of water pollution in the nation and has been recognized as a leading cause of  
14 significant and cumulative harmful impacts to the water quality of San Francisco Bay. Unfortunately,  
15 the Permit approved by the Regional Board governing such pollution from municipal sources is  
16 unlawful for several reasons, including (1) the inclusion of “safe harbor” provisions that excuse  
17 compliance with receiving water limitations and discharge prohibitions for several key pollutants of  
18 concern, and (2) inadequate monitoring provisions that fail to assure compliance with Permit limitations.  
19 These violations of the Clean Water Act and state law present compelling reasons for the State Board to  
20 exercise its statutory duty to correct these deficiencies in order to protect the waters of the San Francisco  
21 Bay region and public health.

22 **B. LEGAL BACKGROUND**

23       In 1972, Congress amended the Federal Water Pollution Control Act of 1948 to remedy the  
24 historically unchecked degradation of the Nation’s waters. The primary goal of the Clean Water Act is  
25 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33  
26 U.S.C. § 1251(a).) The Act sought to achieve fishable and swimmable conditions, whenever possible,  
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1 by 1983, and to eliminate the discharge of pollutants into navigable waters by 1985. (*Id.* § 1251(a)(1)-  
2 (2).)

3 The Clean Water Act prohibits the discharge of any pollutant from a point source into a water of  
4 the United States, except in compliance with the Act. (*Id.* §§ 1311(a), 1342.) The primary means for  
5 implementing this prohibition is the National Pollution Discharge Elimination System (“NPDES”)  
6 program. (*Id.* § 1342.) NPDES permits are issued by either the United States Environmental Protection  
7 Agency (“EPA”) or by states, like California, that have obtained EPA approval. (*Id.* § 1342(b); 40  
8 C.F.R. § 131.4.)

9 The NPDES permitting program employs a “dual-standard” framework: technology-based  
10 requirements and water quality-focused requirements. Technology-based requirements are effluent  
11 limitations based on specified levels of technology for reducing water pollution. (33 U.S.C. §  
12 1311(b)(1)(A); *Communities for a Better Environment v. State Water Resources Control Bd.* (2005) 132  
13 Cal.App.4th 1313, 1320.) The technology-based standard applicable to municipal stormwater  
14 dischargers requires that stormwater be controlled to the “maximum extent practicable.” (33 U.S.C. §  
15 1342(p)(3)(B)(iii).) With respect to dry weather discharges, referred to as non-stormwater discharges,  
16 the statutory requirement is to “effectively prohibit” all such discharges. (*Id.* § 1342(p)(3)(B)(ii).)

17 Congress supplemented technology-based effluent limitations with “water quality-based”  
18 limitations “so that numerous point sources, despite individual compliance with effluent limitations, may  
19 be further regulated to prevent water quality from falling below acceptable levels.” (*City of Burbank v.*  
20 *State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 620.) These “water quality standards”  
21 (“WQSs”) include maximum permissible pollutant levels that must be sufficiently stringent to protect  
22 public health and enhance water quality, consistent with the uses for which the water bodies have been  
23 designated. (33 U.S.C. § 1313(c)(2)(A).) WQSs are usually set by states pursuant to federal  
24 requirements. (*Id.* § 1313(a)(1).) Achievement of WQSs is central to the objectives and goals of the  
25 Clean Water Act. Like all NPDES permits, MS4 permits must ensure that discharges from storm drains  
26 do not cause or contribute to a violation of WQSs. (*Id.* §§ 1311(a), 1313, 1342(p).) Once effluent  
27 limitations and other standards and conditions are established in an NPDES permit, a renewed,  
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1 resissued, or modified permit may not contain weaker standards except in limited circumstances. (*Id.* §  
2 1342(o); 40 C.F.R. § 122.44(l).)

3 For impaired waters that do not meet WQSs through effluent limitations, states must establish  
4 total maximum daily loads (“TMDLs”) which set a daily limit on the discharge of each pollutant  
5 necessary to achieve WQSs. (*Id.* § 1313(d)(1).) The TMDL assigns a waste load allocation (“WLA”) to  
6 each point source for which an NPDES permit is required. (*Communities for a Better Environment*, 132  
7 Cal.App.4th at 1321.) “Once a TMDL is developed, effluent limitations in NPDES permits must be  
8 consistent with the WLAs in the TMDL.” (*Id.* [citing 40 C.F.R. § 122.44(d)(1)(vii)(B)].)

9 The Clean Water Act places the responsibility of monitoring discharges to evaluate permit  
10 compliance on the discharger to allow for efficient compliance determinations and to ease the burden on  
11 the regulatory agency. (*Sierra Club v. Union Oil Co. of Cal.* (9th Cir. 1987) 813 F.2d 1480, 1491-92;  
12 *see also City of Brentwood v. Central Valley Reg. Water Quality Control Bd.* (2004) 123 Cal.App.4th  
13 714, 723 [explaining purpose and intent of Clean Water Act’s self-monitoring requirements].) The  
14 permitting agency must adopt monitoring requirements in NPDES permits that will produce the  
15 information necessary to make efficient compliance determinations. (*Sierra Club*, 813 F.2d at 1491-92;  
16 *Natural Res. Def. Council v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194, 1208-09 [discussing  
17 the necessity and purpose of self-monitoring in context of municipal stormwater NPDES permits].) The  
18 Clean Water Act’s implementing regulations set forth the monitoring requirements that must be in  
19 NPDES permits. (*See* 40 C.F.R. §§ 122.44(i), 122.48.) Among these requirements is the express  
20 mandate that NPDES permits include provisions “to assure compliance with permit limitations” through  
21 the monitoring of the amount of pollutants discharged, the volume of effluent discharged from each  
22 outfall, and “other measurements as appropriate.” (40 C.F.R. § 122.44(a)(1)(i)-(iii).)

### 23 **C. FACTUAL BACKGROUND**

24 In 2009, the Regional Board adopted an NPDES Permit regulating the MS4s in several Bay Area  
25 cities and counties, combining six prior Phase I municipal stormwater NPDES permits into one region-  
26 wide permit. (Regional Board Order R2-2009-0074, NPDES Permit No. CAS612008 [Oct. 14, 2009]  
27 [the “2009 Permit”].) The 2009 Permit provided standards and requirements for municipal operations,  
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1 new development and redevelopment, and industrial, commercial, and construction sites, among other  
2 areas. It included provisions for pollutants in the region that had already established TMDLs, such as  
3 mercury and polychlorinated biphenyls (“PCBs”), and also addressed other pollutants of concern (e.g.,  
4 PBDEs, DDT, dieldrin, chlordane, and selenium) for which TMDLs were planned or in early stages of  
5 development. The 2009 Permit established a water quality monitoring program that required sampling  
6 during multiple wet weather events each year. (2009 Permit, Section C.8.)

7       The 2009 Permit further attempted to address the pervasive problem of trash pollution by setting  
8 trash load reduction requirements, including a 40% reduction in trash loading by July 1, 2014 from a  
9 yet-to-be established 2009 baseline, and requiring specific control actions to reduce trash loading from  
10 MS4s. (2009 Permit, Section C.10.) The 2009 Permit did not contain trash monitoring provisions  
11 sufficient to determine compliance with trash load reduction standards, but instead requested that  
12 Permittees develop monitoring methods. In June 2012, the Regional Board rejected Permittees’  
13 proposed baseline loading rate and trash tracking methods, and stated that implementation of this  
14 proposal “will not attain the 40 percent trash load reduction level by July 2014.”<sup>1</sup> Despite this, the  
15 Regional Board has issued no notices of violation for failure to meet the 2014 standard, failure to  
16 develop baseline trash loading rates, or failure to develop adequate monitoring methods.

17       The 2009 Permit included Discharge Prohibitions that prohibited the discharge of non-  
18 stormwater, trash, and other solid wastes into waters. (2009 Permit, Section A.) It also contained  
19 Receiving Water Limitations that prohibited discharges that would create a condition of nuisance,  
20 adversely affect beneficial uses, or “cause or contribute to a violation of any applicable water quality  
21 standard for receiving waters.” (2009 Permit, Section B.) The Permittees were instructed to comply  
22 with these Discharge Prohibitions and Receiving Water Limitations through implementation of the  
23 control measures and other actions specified in the 2009 Permit. (2009 Permit, Section C.) However, if

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25 <sup>1</sup> Letter from Bruce H. Wolfe (Regional Board Executive Officer) to the Municipal Regional  
26 Stormwater NPDES Permit (Order R2-2009-0074) Permittees re: Water Board Staff Review of Trash  
27 Plans and Reports (June 7, 2012), *available at*:  
[http://www.waterboards.ca.gov/sanfranciscobay/water\\_issues/programs/stormwater/MRP/09-04-  
28 2012/Staff\\_Comments\\_TR.PDF](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/stormwater/MRP/09-04-2012/Staff_Comments_TR.PDF).

1 exceedances of water quality standards persisted, notwithstanding these control measures, the Permittees  
2 were directed to identify and implement additional best management practices (“BMPs”) “to prevent or  
3 reduce the discharge of pollutants that are causing or contributing to the exceedance of the WQSs.”  
4 (2009 Permit, Section C.1.a.)

5 On November 19, 2015, the Regional Board amended the 2009 Permit in Order No. R2-2015-  
6 0049 (the “Permit” or “2015 Permit”). Similar to the 2009 Permit, the 2015 Permit included Discharge  
7 Prohibitions and Receiving Water Limitations in Sections A and B, respectively. However, the 2015  
8 Permit added “safe harbor” language stating that the Permittees would be in compliance with these  
9 sections with regard to certain pollutants and receiving waters as long as they complied with the  
10 “requirements and schedules” contained in other sections of the 2015 Permit, regardless of WQS  
11 exceedances or violations of the discharge prohibitions. (2015 Permit, Section C.1.) Specifically, the  
12 new language in the 2015 Permit provides that:

13 Compliance with Provisions C.9 through C.12 and C.14 of this Order, which prescribe  
14 requirements and schedules for Permittees identified therein to manage their discharges  
15 that may cause or contribute to violations of water quality standards (WQS) for  
16 pesticides, trash, mercury, polychlorinated biphenyls (PCBs), and bacteria, shall  
17 constitute compliance during the term of this Order with Receiving Water Limitations  
18 B.1 and B.2 for the pollutants and the receiving waters identified in the provisions.  
19 Compliance with Provision C.10, which prescribes requirements and schedules for  
20 Permittees to manage their discharges of trash, shall also constitute compliance with  
21 Discharge Prohibitions A.1 and A.2 during the term of this Order for discharges of trash.  
22 (2015 Permit, Section C.1.)

23 The 2015 Permit also included an updated water quality monitoring section, but required no wet  
24 weather or outfall sampling for any pollutants, with the exception of pesticides and toxicity monitoring.  
25 (2015 Permit, Section C.8.) While the 2015 Permit provided additional provisions regarding receiving  
26 water monitoring for trash, it essentially gives Permittees the entire permit term to determine how to  
27 conduct such monitoring, with little guidance from the Regional Board or opportunities for input from  
28 members of the public. (2015 Permit, Section C.10.b.v.)

1 **D. STANDARD OF REVIEW**

2 The State Board must exercise its independent judgment as to whether a Regional Board action  
3 is reasonable. (*See Stinnes-Western Chemical Corp.*, State Board WQ Order No. 86-16 (1986).)  
4 Specifically, the State Board’s review is equivalent to the standard a reviewing court would apply under  
5 California Code of Civil Procedure Section 1094.5, which states that an “[a]buse of discretion is  
6 established if the respondent has not proceeded in the manner required by law, the order or decision is  
7 not supported by the findings, or the findings are not supported by the evidence.” (Cal. Civ. Proc. Code  
8 § 1094.5(b); *see also Zuniga v. San Diego County Civil Serv. Comm’n* (2006) 137 Cal.App.4th 1255,  
9 1258 [applying same statutory standard].) “Where it is claimed that the findings are not supported by  
10 the evidence, . . . abuse of discretion is established if the court determines that the findings are not  
11 supported by the weight of the evidence.” (Cal. Civ. Proc. Code § 1094.5(c).)

12 The administrative decision must be accompanied by findings that allow the court reviewing the  
13 order or decision to “bridge the analytic gap between the raw evidence and ultimate decision or order.”  
14 (*Topanga Ass’n for a Scenic Cmty. v. County of San Diego* (1974) 11 Cal.3d 506, 515.) This  
15 requirement “serves to conduce the administrative body to draw legally relevant sub-conclusions  
16 supportive of its ultimate decision . . . to facilitate orderly analysis and minimize the likelihood that the  
17 agency will randomly leap from evidence to conclusions.” (*Id.* at 516.) “Absent such roadsigns, a  
18 reviewing court would be forced into unguided and resource-consuming explorations; it would have to  
19 grope through the record to determine whether some combination of credible evidentiary items which  
20 supported some line of factual and legal conclusions supported the ultimate order or decision of the  
21 agency.” (*Id.*)

22 **E. ARGUMENT**

23 **1. The 2015 Permit Creates Illegal Safe Harbors in Violation of Federal Anti-**  
24 **Backsliding Requirements and State Board Order WQ 2015-0075.**

25 Rather than maintaining the 2009 Permit’s Discharge Prohibitions and Receiving Water  
26 Limitations, the 2015 Permit includes “safe harbor” language that exempts Permittees from complying  
27 with these provisions for specific pollutants and receiving waters as long as Permittees comply with the  
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1 “requirements and schedules” identified in the 2015 Permit. (2015 Permit, Section C.1.) These new  
2 safe harbor provisions violate the anti-backsliding requirements of the Clean Water Act as well as the  
3 State Board’s Order governing the inclusion of such provisions in MS4 Permits.

4 **a. The 2015 Permit’s Safe Harbors Violate Federal Anti-Backsliding**  
5 **Requirements.**

6 The Clean Water Act and its implementing regulations prohibit backsliding, or the weakening of  
7 permit terms, from a previous permit. In particular, Section 402(o)(1) of the Act provides that, for  
8 effluent limitations based on a state standard, “a permit may not be renewed, reissued, or modified to  
9 contain effluent limitations which are less stringent than the comparable effluent limitations in the  
10 previous permit,” except in specified circumstances not present here. (33 U.S.C. § 1342(o)(1).)  
11 Similarly, federal regulations require that “when a permit is renewed or reissued, interim effluent  
12 limitations, standards or conditions must be at least as stringent as the final effluent limitations,  
13 standards, or conditions in the previous permit. . . .” (40 C.F.R. § 122.44(l)(1).) By providing a safe  
14 harbor that waives requirements to comply with Discharge Prohibitions and Receiving Water  
15 Limitations, even where such standards are not being met, the 2015 Permit violates these requirements.

16 The Regional Board makes three arguments as to why the safe harbor provisions in the 2015  
17 Permit do not violate anti-backsliding requirements. (2015 Permit, Fact Sheet, at A-16 – A17.)<sup>2</sup> First,  
18 the Regional Board claims that the Receiving Water Limitations<sup>3</sup> are not subject to statutory anti-  
19 backsliding requirements because they “are imposed under section 402(p)(3)(B) of the Clean Water Act  
20 rather than based on best professional judgment, or based on section 301(b)(1)(C) or sections 303(d) or  
21 (e).” (*Id.* at A-17.) While admitting that the applicability 40 C.F.R. § 122.44(l)(1) is “less clear,” the  
22 Regional Board contends that the anti-backsliding regulations also do not apply, stating that “the  
23 regulatory history suggests that USEPA’s intent was to establish the anti-backsliding regulations with  
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25 <sup>2</sup> Although without citation, this discussion largely duplicates findings by the State Board in Order WQ  
26 2015-0075 at 22-23.

27 <sup>3</sup> The Regional Board does not make any argument that the Discharge Prohibitions in the 2015 Permit  
28 are not covered by anti-backsliding provisions.



1 respect to evolving technology standards for traditional point sources.” (*Id.* [citing 44 Fed. Reg. 32,854,  
2 32,864 (Jun. 7, 1979)].)

3       The Regional Board’s interpretation of the federal anti-backsliding requirements is incorrect.  
4 While there may be some ambiguity in the statute regarding whether section 402(o) applies to municipal  
5 NPDES permits adopted pursuant to section 402(p)(3)(B), implied exemptions to statutory provisions  
6 are disfavored. (*See Morton v. Mancari* (1974) 417 U.S. 535, 549.) Given that section 301 of the Act  
7 (governing effluent limitations) explicitly applies to NPDES permits issued pursuant to section 402, and  
8 the broad definition of “effluent limitation” in section 502(11), there is little basis for finding that the  
9 Receiving Water Limitations and Discharge Prohibitions in the 2015 Permit are not subject to the anti-  
10 backsliding requirements in section 402(o). (33 U.S.C. §§ 1311(a) [“Except as in compliance with this  
11 section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant  
12 by any person shall be unlawful.”], 1362(11) [defining “effluent limitation” to mean “any restriction  
13 established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical,  
14 biological, and other constituents which are discharged from point sources into navigable waters”].) Not  
15 surprisingly, EPA itself has previously applied the anti-backsliding requirements in Section 402(o) to  
16 MS4 permits.<sup>4</sup> (*See Env’tl. Def. Ctr. v. U.S. EPA* (9th Cir. 2003) 344 F.3d 832, 875 [EPA’s interpretation  
17 of Clean Water Act section 402 is entitled to deference].)

18       In any event, the Discharge Prohibitions and Receiving Water Limitations in the 2015 Permit  
19 easily fit within the “standards” or “conditions” protected by the anti-backsliding requirements in EPA  
20 regulations. (*See* 40 C.F.R. § 122.44(l)(1); EPA, NPDES Permit Writers’ Manual (Sept. 2010) at 7-4<sup>5</sup>

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21 <sup>4</sup> *See* EPA, Fact Sheet, Reissuance of NPDES MS4 Permit No. DC0000221 (2011) at 31 [evaluating  
22 backsliding in MS4 permit for District of Columbia], *available at*:  
23 [http://yosemite.epa.gov/oa/eab\\_web\\_docket.nsf/Filings%20By%20Appeal%20Number/BD6B2DAA911E0A7885257A1B004EBCD7/\\$File/AR%20Document%201.1%20...39.13.pdf](http://yosemite.epa.gov/oa/eab_web_docket.nsf/Filings%20By%20Appeal%20Number/BD6B2DAA911E0A7885257A1B004EBCD7/$File/AR%20Document%201.1%20...39.13.pdf);

24 EPA, Comments on Specific Objection to Prince George’s County Phase I Municipal Separate Storm  
25 Sewer (MS4) Permit MD0068284 (Nov. 29, 2012) at 3 [discussing EPA objections to draft MS4 permit  
26 due to backsliding], *available at*:  
27 [http://www.mde.maryland.gov/programs/Water/StormwaterManagementProgram/SedimentandStormwaterHome/Documents/SHA%20MS4%20Basis%20for%20Final%20Determination%2009\\_30\\_2015.pdf](http://www.mde.maryland.gov/programs/Water/StormwaterManagementProgram/SedimentandStormwaterHome/Documents/SHA%20MS4%20Basis%20for%20Final%20Determination%2009_30_2015.pdf).

<sup>5</sup> The EPA NPDES Permit Writers’ Manual is *available at*:  
28 [http://www3.epa.gov/npdes/pubs/pwm\\_2010.pdf](http://www3.epa.gov/npdes/pubs/pwm_2010.pdf).

1 [finding that “regulations at § 122.44(l)(1) restrict the relaxation of final effluent limitations and the  
2 relaxation of standards or conditions contained in existing permits. Thus, this regulation, in effect,  
3 addresses all types of backsliding not addressed in the CWA provisions (e.g., backsliding from  
4 limitations derived from effluent guidelines, from new source performance standards, from existing  
5 case-by-case limitations to new case-by-case limitations, and from conditions such as monitoring  
6 requirements that are not effluent limitations].”) The Regional Board’s citation to an outdated version of  
7 the anti-backsliding regulations, which predated the 1987 Clean Water Act Amendments and the  
8 addition of section 402(o), is unjustified and does not provides support for its position. EPA amended  
9 the anti-backsliding regulations following the passage of section 402(o), and in doing so, explicitly  
10 stated that “the regulation at § 122.44(l)(1) restricts backsliding in cases not covered by the [1987 Clean  
11 Water Act] amendments.” (54 Fed. Reg. 246, 251-52 (Jan. 4, 1989). Thus, the anti-backsliding  
12 regulations apply to the Receiving Water Limitations and Discharge Prohibitions in the 2015 Permit.

13         Second, the Regional Board argues that even if the anti-backsliding provisions apply, no  
14 violation has occurred because “the actual requirements in Provisions C.9 to C.12 and C.14 are as or  
15 more stringent than the requirements in the previous permit.” (2015 Permit, Fact Sheet, at A-17.)  
16 However, the Regional Board provides no factual or legal basis for its suggestion that the requirements  
17 governing pesticides and toxicity, trash, mercury, and PCBs are any more stringent than those contained  
18 in the 2009 Permit. Regardless, the Regional Board does not dispute the fact the compliance language  
19 in Section C.1 of the 2015 Permit, which contains the new safe harbor provisions, is less stringent than  
20 the previous permit.

21         Finally, the Regional Board argues that even if backsliding has occurred with regard to receiving  
22 water limitations, “the exception to backsliding based on new information and changed circumstances  
23 since the last permit applies.” (2015 Permit, Fact Sheet, at A-17 [citing 40 C.F.R. § 122.44(l)(1); 40  
24 C.F.R. § 122.62(a)(2); 40 C.F.R. § 122.44(l)(2)(i)(B)(1)].) According to these regulations, such an  
25 exception applies where “[i]nformation is available which was not available at the time of permit  
26 issuance (other than revised regulations, guidance, or test methods) and which would have justified the  
27 application of a less stringent effluent limitation at the time of permit issuance.” (40 C.F.R. §  
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1 122.44(l)(2)(i)(B)(1).) However, the Regional Board fails to specify what new information it is  
2 referring to, other than to vaguely state that “experience and knowledge gained through implementation  
3 of actions required by the previous permit and results of source identification studies and control  
4 measure effectiveness studies since the adoption of the previous permit.” (2015 Permit, Fact Sheet, at  
5 A-17.) Of course, any time an NPDES permit is reissued after several years, “experience and  
6 knowledge” should have been gained through implementation of the previous permit. However, such a  
7 broad interpretation would render the anti-backsliding requirements meaningless, and the Regional  
8 Board cites no authority for such an expansive reading of this exception.

9 In addition, the Regional Board fails to address the fact that Clean Water Act section 402(o)(3)  
10 contains a safety clause that provides an absolute limitation on backsliding. This section prohibits the  
11 relaxation of effluent limitations in all cases if the revised effluent limitations would result in a violation  
12 of applicable effluent guidelines or water quality standards. (33 U.S.C. § 1342(o).) Similarly, the Act’s  
13 implementing regulations provide that “[i]n no event may such a permit to discharge into waters be  
14 renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such  
15 limitation would result in a violation of a water quality standard under section 303 applicable to such  
16 waters.” (40 C.F.R. § 122.44(l)(2)(ii).) Thus, even if one or more of the backsliding exceptions outlined  
17 in the statute is applicable and met, section 402(o)(3) and the implementing regulations act as a floor and  
18 restrict the extent to which effluent limitations may be relaxed. By excusing compliance with Receiving  
19 Water Limitations, which prohibit discharges that cause or contribute to violations of water quality  
20 standards, the 2015 Permit explicitly violates this safety clause and is unlawful.

21 **b. The 2015 Permit’s Safe Harbors Violate State Board Order WQ 2015-0075.**

22 In Order WQ 2015-0075, the State Board considered the legality of safe harbor provisions in the  
23 MS4 permit for Los Angeles County and established several principals that must be followed for the  
24 inclusion of an alternative compliance pathway. (State Board Order WQ 2015-0075 [“LA Order”], at  
25 30-52.) In particular, the State Board evaluated the Los Angeles MS4 permit’s requirements to develop  
26 and implement a watershed management program (“WMP”) or enhanced watershed management  
27 program (“EWMP”) to achieve compliance with receiving water limitations, and the reasonable  
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1 assurance analysis (“RAA”) supporting the WMP/EWMP. The State Board found that such an approach  
2 “is a clearly defined, implementable, and enforceable alternative” to achieving receiving water  
3 limitations while remaining in compliance with the terms of the permit. (*Id.*) The State Board directed  
4 other regional boards “to consider the WMP/EWMP approach to receiving water limitations  
5 compliance,” and found that any regional differences “must nevertheless be guided by a few principles.”  
6 (*Id.* at 51.) Of particular relevance here, the State Board required that:

7 1. The receiving water limitations provisions of Phase I MS4 permits should continue to  
8 require compliance with water quality standards in the receiving water and should not  
deem good faith engagement in the iterative process to constitute such compliance.

9 ...  
10 3. The Phase I MS4 permits should incorporate an ambitious, rigorous, and transparent  
11 alternative compliance path that allows permittees appropriate time to come into  
compliance with receiving water limitations without being in violation of the receiving  
water limitations during full implementation of the compliance alternative.

12 ...  
13 7. The alternative compliance path should have rigor and accountability. Permittees  
14 should be required, through a transparent process, to show that they have analyzed the  
15 water quality issues in the watershed, prioritized those issues, and proposed appropriate  
solutions. Permittees should be further required, again through a transparent process, to  
monitor the results and return to their analysis to verify assumptions and update the  
solutions.

16 (LA Order at 51-52.)

17 Here, the 2015 Permit contains nothing even remotely close to the rigor, accountability, or  
18 transparency in the WMP/EWMP approach of the Los Angeles MS4 permit. The 2015 Permit provides  
19 no objective criteria, specifications, or guidance, and requires no validation, peer-reviewed acceptable  
20 modeling methods, or minimum data requirements, nor does it appear to even consider such  
21 requirements necessary. As discussed in more detail below, the 2015 Permit does not require  
22 monitoring or data collection that would be needed to support such an approach, in contrast to MS4  
23 permits in the Los Angeles region, which requires rigorous receiving water and end-of-pipe monitoring.  
24 In fact, the only language in the 2015 Permit remotely related to the WMP/EWMP process is the  
25 requirement for Permittees to “submit in their 2020 Annual Report a reasonable assurance analysis to  
26 demonstrate” specified reductions in mercury and PCBs by 2040 through the implementation of green  
27 infrastructure projects. (2015 Permit, Sections C.11.c.iii, C.12.c.iii.)

1 Yet the Regional Board provides almost no detail or technical guidance to Permittees with regard  
2 to how to conduct such modeling. In its Fact Sheet, the Regional Board simply states that:

3 [P]ermittees in the Bay Area can take advantage of related (reasonable assurance  
4 analysis) efforts already underway in Southern California. The Los Angeles Regional  
5 Water Board has produced a useful set of guidelines for conducting a Reasonable  
6 Assurance Analysis (RAA) for the watershed management programs that are required  
7 through their MS4 permits. These guidelines provide an excellent reference and starting  
8 point for the RAA required through C.11/12.c in terms of the mechanics of the analysis,  
9 BMP identification, critical condition selection, choice of models, model calibration  
10 criteria, modeling inputs, and model outputs. The crucial feature of the Southern  
11 California RAAs is that they must demonstrate with sufficient analytical rigor that the  
suite of foreseeable control measures to reduce loads will result in compliance with final  
WLAs. The RAA performed for PCBs and mercury for the San Francisco Bay Area will  
be similar in many respects to the type of analysis described in the Southern California  
guidance document, but they must also account for the local watershed characteristics as  
well as what has been learned about the distribution, fate, and transport characteristics of  
PCBs and mercury.

12 (2015 Permit, Fact Sheet, at A-109.) Simply referencing efforts in other regions that provide a “starting  
13 point” for Permittees in the Bay Area hardly matches the rigor and accountability required by the LA  
14 Order. In addition, the language in the 2015 Permit provides no mechanism for public review and  
15 comment on this RAA process. (*See* LA Order at 37 [an “essential” component in ensuring that  
16 “WMPs/EWMPs are in fact designed to achieve receiving water limitations” is that “the WMPs/EWMPs  
17 are subject to a public review and comment period”].) Furthermore, despite the fact that Permittees are  
18 not required to submit an RAA until the end of the permit term, the 2015 Permit excuses compliance  
19 with Discharge Prohibitions and Receiving Water Limitations throughout the 5-year term of the Permit  
20 simply for engaging in the process. (*See* LA Order at 49 [finding that “‘safe harbor’ in the planning  
21 phase is appropriate only if it is clearly constrained in a manner that sustains incentives to move on to  
22 approval and implementation and is structured with clear, enforceable provisions”].)

23 The safe harbor provisions are even more egregious with regard to the trash load reduction  
24 requirements in Section C.10 of the 2015 Permit, which do not fall under an adopted TMDL wasteload  
25 allocation or implementation plan. Under Section C.10, Permittees are required to use visual  
26 assessments and mapping along roadways to categorize areas into Very High, High, Moderate, and Low  
27 trash generation areas, and then implement trash control actions to reduce trash generation rates and  
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1 achieve the specified percentage reductions. The 2015 Permit contains no specified monitoring  
2 requirements for determining trash load reductions or whether management actions translate into trash  
3 reductions in receiving waters, many of which are 303(d) listed for trash impairment. This scheme  
4 provides a subjective, ad-hoc process with none of the technical rigor or objective standards of the  
5 WMP/WEMP approach, and no opportunity for public review or comment on whether Permittees are  
6 actually achieving the required trash load reductions. Yet simply complying with the “requirements and  
7 schedules” in Section C.10 excuses Permittees from compliance with the Receiving Water Limitations  
8 and Discharge Prohibitions related to trash. (2015 Permit, Section C.1.)

9 In sum, the safe harbor provisions in the 2015 Permit are inconsistent with the requirements of  
10 State Board Order WQ 2015-0075 and must be removed from the Permit.

11 **2. The 2015 Permit Fails to Include Monitoring Sufficient to Determine Compliance.**

12 The Clean Water Act and its implementing regulations require that a permitting agency include  
13 monitoring provisions in NPDES permits that are adequate to demonstrate whether dischargers actually  
14 comply with the terms of the permit. (*See* 33 U.S.C. § 1342(a)(2); 40 C.F.R. §§ 122.41(j)(1),  
15 122.44(i)(1), 122.48(b); *see also* Water Code § 13383.5.) As recently explained by the Ninth Circuit  
16 Court of Appeals in a challenge to an MS4 permit, “an NPDES Permit is unlawful if a permittee is not  
17 required to effectively monitor its permit compliance.” (*County of Los Angeles*, 725 F.3d at 1207; *see*  
18 *also Natural Res. Def. Council v. U.S. EPA* (2d Cir. 2015) 804 F.3d 149, 175-76 [finding that NPDES  
19 permit for vessel discharges violated Clean Water Act because it did not “contain a mechanism to  
20 evaluate compliance” with effluent limitations].) In particular, NPDES permits must include provisions  
21 “to assure compliance with permit limitations” through the monitoring of the amount of pollutants  
22 discharged, the volume of effluent discharged from each outfall, and “other measurements as  
23 appropriate.” (40 C.F.R. § 122.44(a)(1)(i)-(iii).)

24 Here, the 2015 Permit’s monitoring requirements are insufficient to determine compliance with  
25 the Permit’s Discharge Prohibitions and Receiving Water Limitations. The Water Quality Monitoring  
26 section of the 2015 Permit requires no stormwater outfall, end-of-pipe, or wet weather monitoring for  
27 any pollutant, with the exception of one annual “wet weather” sample from each county for pesticides  
28

1 and toxicity monitoring. (2015 Permit, Section C.8; *see id.* Section C.8.g.iii [“Wet Weather Pesticide  
2 and Toxicity Monitoring”].) Given this lack of data, it will be impossible to evaluate whether any  
3 individual Permittee, or the Permittees collectively, are in compliance with the 2015 Permit. For  
4 example, without any representative data of stormwater discharges from the Permittees’ MS4s, there  
5 will be no way to determine whether such discharges are causing or contributing to a violation of any  
6 applicable water quality standard for receiving waters (Receiving Water Limitation B.2), or are resulting  
7 in the discharge of non-stormwater or trash into surface waters (Discharge Prohibitions A.1 and A.2).  
8 The 2015 Permit contrasts with current MS4 permits in the Los Angeles, Santa Ana, and San Diego  
9 regions, which require monitoring for an exhaustive list of pollutants in both receiving water and at  
10 stormwater outfalls, during storm events, by all Permittees.

11 In the Fact Sheet for the 2015 Permit, the Regional Board attempts to justify the 2015 Permit’s  
12 lack of end-of-pipe monitoring by stating that the National Research Council (“NRC”) and EPA believe  
13 that “MS4 end-of-pipe monitoring produces data of limited usefulness.” (2015 Permit, Fact Sheet, at A-  
14 72 – A-73.) However, the NRC report cited for this conclusion does not support such findings. Rather,  
15 as the NRC concluded with regard to MS4 stormwater monitoring, “[s]tormwater management would  
16 benefit most substantially from a well-balanced monitoring program that encompasses chemical,  
17 biological, and physical parameters *from outfalls to receiving waters*.”<sup>6</sup> Not surprisingly, EPA has often  
18 supported outfall as well as in-stream monitoring requirements in MS4 permits in California and  
19 elsewhere.<sup>7</sup>

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20 <sup>6</sup> NRC, Urban Stormwater Management in the United States (2009), at 7, *available at*:  
21 <http://www.nap.edu/catalog/12465/urban-stormwater-management-in-the-united-states> (emphasis  
added).

22 <sup>7</sup> *See, e.g.*, EPA, Comments on Draft MS4 Permit for Los Angeles County (NPDES Permit No.  
23 CAS004001) (Jul. 23, 2012) at 5 [“we support instream as well as outfall monitoring since they both  
24 may provide useful information”]; EPA, Comments on Draft MS4 Permit for the City of Long Beach  
25 (Permit No. CAS004003) (Jan. 15, 2014) at 1 [“we support the monitoring program (Attachment E),  
26 particularly the requirement for outfall monitoring in addition to instream monitoring since this will help  
27 identify which outfalls may be contributing to exceedances of WLAs or receiving water limitations”];  
28 EPA, Comments on Draft MS4 Permit for Orange County (Permit No. CAS618030) (Jan. 20, 2014) at 6  
[recommending sufficient sampling at representative “MS4 outfalls” to “allow a compliance  
determination with each applicable WLA”], *available at*:

1 The 2015 Permit also includes a separate receiving water monitoring section for trash discharges.  
2 (2015 Permit, Section C.10.b.v.) However, this section provides Permittees almost the entire length of  
3 the Permit term to “develop receiving water monitoring tools and protocols,” and only requires that  
4 Permittees submit “a final report by July 1, 2020 on the proposed trash receiving water monitoring  
5 program.” (*Id.*) Actual sampling of receiving waters for trash discharges to evaluate whether or not  
6 control actions are actually reducing trash from the MS4 or complying with the Receiving Water  
7 Limitations and Discharge Prohibitions is nowhere required.<sup>8</sup>

8 In sum, the 2015 Permit does not include monitoring provisions sufficient to determine  
9 compliance with permit terms or yield data which are representative of the monitored activity, and  
10 therefore must be remanded to the Regional Board to address such deficiencies.

11 **3. The Regional Board’s Decision to Adopt the 2015 Permit, Including its Safe Harbor**  
12 **and Monitoring Provisions, Is Not Supported by the Findings or the Evidence in the**  
**Administrative Record.**

13 The Regional Board’s approval of the 2015 Permit violates long-established requirements for  
14 agency decision-making. The Regional Board’s findings fail to show the Board’s mode of analysis to  
15 “bridge the analytic gap between the raw evidence and [the] ultimate decision or order.” (*See Topanga*  
16 *Ass’n for a Scenic Cmty*, 11 Cal.3d at 515.) Moreover, the Regional Board’s final decision lacks  
17 evidentiary support in the record. The absence of adequate findings or evidence renders the Regional  
18 Board’s decision unlawful. (*See* Cal. Civ. Proc. Code § 1094.5(b); *see also* *Zuniga*, 137 Cal. App. 4th at  
19 1258.)

20 The 2015 Permit’s discussion of anti-backsliding requirements exemplifies the Regional Board’s  
21 lack of sufficient analysis. Baykeeper raised significant legal and factual arguments before the Regional  
22 Board, both in written and oral comments, to show that the new safe harbors in the 2015 Permit violate  
23 federal anti-backsliding requirements. In response, the Regional Board simply repeated (incompletely)

24 [http://www.waterboards.ca.gov/sandiego/board\\_info/agendas/2015/Nov/Item11/2015-](http://www.waterboards.ca.gov/sandiego/board_info/agendas/2015/Nov/Item11/2015-1118_Item11_SupDoc10_USEPALetters.pdf)  
25 [1118\\_Item11\\_SupDoc10\\_USEPALetters.pdf](http://www.waterboards.ca.gov/sandiego/board_info/agendas/2015/Nov/Item11/2015-1118_Item11_SupDoc10_USEPALetters.pdf).

26 <sup>8</sup> The 2015 Permit’s monitoring provisions for trash are also inconsistent with Monitoring and Reporting  
27 requirements in State Board Resolution No. 2015-0019, the Final Trash Provisions of the Water Quality  
28 Control Plan for Inland Surface Waters, Enclosed Bay, and Estuaries of California (“Trash  
Amendments”). (*See* Trash Amendments, Appendix E, at E-7 – E-8.)



1 the legal conclusions in State Board Order WQ 2015-0075, then stated, without any legal or factual  
2 basis, that the requirements in the 2015 Permit “are as or more stringent than the requirements in the  
3 previous permit.” (2015 Permit, Fact Sheet, at A-16 – A-17.) The Regional Board also stated that “the  
4 exception to backsliding based on new information and changed circumstances since the last permit  
5 applies,” without identifying what new information would justify applying such an exception from these  
6 explicit statutory requirements. (*Id.* at A-17.) Such bare conclusions are impermissible to support the  
7 decision to adopt the safe harbor language in Section C.1. (*See American Funeral Concepts-American*  
8 *Cremation Soc’y v. Board of Funeral Directors and Embalmers* (1982) 136 Cal.App.3d 303, 309  
9 [“administrative findings set forth solely in the language of the applicable legislation are insufficient”].)

10 Baykeeper also raised significant legal and factual arguments before the Regional Board to  
11 demonstrate the safe harbors incorporated in the 2015 Permit violate State Board Order WQ 2015-0075.  
12 While the Regional Board attempted in the Fact Sheet to address the principles articulated by the State  
13 Board, it again responded with conclusory statements that have no basis in the Permit language itself.  
14 (*See* 2015 Permit, Fact Sheet, at A-24 – A-26.) For example, the Regional Board claims that the 2015  
15 Permit requirements “are ambitious and rigorous because they will require Permittees to fully commit to  
16 and implement challenging but achievable tasks to ultimately meet water quality objectives,” and thus  
17 “appl[y] principles 1, 2, and 3” of the State Board Order. (*Id.* at A-25.) Yet nowhere does the Regional  
18 Board actually discuss how the 2015 Permit provisions compare to the WMP/EWMP approach, or even  
19 mention how it is transparent, such as by including opportunities for public review and comment. (*See*  
20 State Board Order WQ 2015-0075 at 37-39, 51-52.) Nor does the Regional Board ever make a specific  
21 showing that the application of a given principle is not appropriate for the region. (*See id.* at 51.)

22 As discussed above in Section E.2, the Regional Board’s stated rationale for not including  
23 monitoring provisions sufficient to determine compliance with the 2015 Permit, including a failure to  
24 require any outfall monitoring or wet weather sampling for most pollutants, is unsupported and lacks  
25 evidentiary support in the record. For all of these reasons, the Regional Board’s decision to adopt the  
26 2015 Permit was unlawful.

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A true and correct copy of this Petition was sent to the Regional Board and the dischargers by email and first class U.S. mail on December 18, 2015. (*See* Proof of Service, attached hereto.)

**9. The substantive issues or objections raised in the petition were raised before the regional board.**

Petitioner has previously raised and presented all the issues addressed in this Petition by comment letters submitted to the Regional Board on March 9, 2015 and July 10, 2015, and in oral testimony at Regional Board workshops and public hearings on June 10, 2015, July 8, 2015, and November 18, 2015. Petitioner also presented power point slides to the Regional Board during its oral testimony on November 18, 2015, which followed the Regional Board's release of substantial revisions to the Permit on October 16, 2015, November 10, 2015, and at the November 18, 2015 public hearing. However, Petitioners and other members of the public were not permitted to submit written comments on these revisions.

Respectfully submitted,

George Tongue

George Torgun  
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## **PROOF OF SERVICE**

I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to the within action. My business address is 1736 Franklin St., Suite 800, Oakland, California 94612.

On December 18, 2015, I served the **PETITION FOR REVIEW OF SAN FRANCISCO REGIONAL WATER QUALITY CONTROL BOARD ACTION ADOPTING ORDER NO. R2-2015-0049** on the following interested parties by placing a true copy thereof without attachments in the United States mail enclosed in a sealed envelope with postage prepaid to the addresses listed below, and by email with attachments to the email addresses listed below:

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I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed at Oakland, California on December 18, 2015.



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George Torgun